

Kamara (Migration) [2019] AATA 6522 (9 December 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr James Kamara

VISA APPLICANTS: Mrs Millicent Eshun
Mr Benjamin Obeng Owusu
Mr Bright Obeng Owusu
Miss Diana Obeng Owusu

CASE NUMBER: 1807652

DIBP REFERENCE(S): BCC2015/1824743, OSF2015/075210

MEMBER: Helena Claringbold

DATE: 9 December 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2) of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations; and
- the second, third and fourth named applicants be considered against the relevant criteria for the grant of the visas.
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Statement made on 09

December 2019 at 10:01am

CATCHWORDS

MIGRATION – refusal – Partner (Provisional) (Class UF) visa - subclass 309 – Federal Circuit Court remittal – genuine and continuing relationship– compelling and compassionate circumstances exist – strong evidence of their commitment to each other –decision under review remitted

LEGISLATION

Migration Act 1958, s 5

Migration Regulations 1994, rr 1.15, 2.03, Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 16 June 2015, Mrs Millicent Eshun (the visa applicant) applied for a Partner (Provisional) (Class UF) visa. The application was based on her spousal relationship with Mr James Kamara, the sponsor and review applicant. Mr Benjamin Obeng Owusu, Mr Bright Obeng Owusu and Miss Diana Obeng Owusu, who are the visa applicant's children, are included in the application as secondary applicants.
2. On 3 October 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the visa applicant and the sponsor are genuine spousal partners. The delegate was also not satisfied that the marriage between the visa applicant and the sponsor is valid under migration law. Therefore, the visa applicant did not meet c.309.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) made under the *Migration Act 1958* (the Act). On 7 November 2016, the review applicant provided the Tribunal with a copy of the delegate's decision record. This is a review of the delegate's decision.
3. On 7 November 2016, the review applicant requested a review of the delegate's decision. On 26 October 2017, the Tribunal differently constituted (the First Tribunal) made a finding that the parties were validly married. The Tribunal found that the visa applicant and the sponsor are not spousal partners. Therefore the visa applicant did not satisfy cl.309.211 or 309.221 of the Regulations. It followed that the secondary visa applicants did not satisfy cl.309.321 of Schedule 2 to the Regulations.
4. On 16 March 2018, the Federal Circuit Court of Australia remitted the matter to the Tribunal for reconsideration.
5. On 20 November 2019, the review applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The Tribunal has taken into consideration, individually and as a whole, all the evidence in the Department of Immigration and Border Protection's (the Department's) case file and the Tribunal's case file and the evidence at the Tribunal hearing.

8. ISSUE

9. The issue in the present case is whether the visa applicant and the sponsor are genuine spousal partners as defined in s.5F of the Act.

10. BACKGROUND ON THE EVIDENCE

11. The visa applicant was born in 1974 in Kumasi, Ghana. Her father is deceased and her mother and three siblings live in Ghana. On 7 January 1992, she married Mr Samuel Owusu. On 10 February 2007, Mr Owusu and the visa applicant separated. There are five children

from this relationship born in 1993, 1995, 1996, 2000 and 2003. The five children live in Ghana. Three of the children, Mr Bright Obeng Owusu, Miss Diana Obeng Owusu and Mr Benjamin Obeng Owusu are secondary visa applicants. The visa applicant's two other sons, are not included in this application.

12. The sponsor was born 1979 in Freetown, Sierra Leone. His parents and six siblings live in Guinea. On 26 December 2003, he married Mrs Martha Kabla Kamara. On 2 June 2006, he first entered Australia. On 26 January 2009, he was granted Australian citizenship. On 3 March 2009, Mrs Kamara and the sponsor divorced. There are no children from this relationship.
13. On 6 June 2010, the sponsor and the visa applicant (the parties) met in Kumasi, Ghana. On 27 October 2014, the parties married in Kumasi, Ghana. The sponsor has travelled to Ghana in 2010, 2014 and 2018.

14. Are the parties validly married?

15. At the time the visa application was made, the visa applicant provided evidence of her marriage to the sponsor. The visa applicant provided inconsistent information about her marriage to and divorce from her previous husband Mr Samuel Owusu. While the Tribunal has doubts about some of the evidence regarding the formal status and cessation of her previous marriage to Mr Owusu, for the purposes of this decision it will proceed on the basis that the parties' marriage is valid for the purposes of the Act as required by s.5F(2)(a).

Are the parties in a spousal relationship?

16. 'Spouse' is defined in s.5F of the Act which provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).

Are the other requirements for a spousal relationship met?

17. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
18. The financial aspects of the parties' relationship, the parties have purchased a plot of land in Ghana and are progressively building a house on the land. Over the course of the relationship, the sponsor transferred over \$62,000 to the visa applicant. This money was obtained through various loans taken out by the sponsor and from his salary. The visa applicant also earns a small salary. The sponsor and the visa applicant contribute to the joint bank account. The parties' joint bank account is utilised for house payments, school fees and living expenses. The Tribunal accepts that they have legal obligations in respect of their jointly owned the house and the joint bank account. It accepts that there is pooling of financial assets and there is some sharing of day-to-day household expenses. There is no evidence that the parties have any joint liabilities.
19. The nature of the parties' household, the sponsor lives in Sydney, Australia. He rents a two bedroomed apartment and sublets one of the rooms in the apartment. The visa applicant lives in Ghana in a house being built by the parties. The sponsor is employed as a security guard and the visa applicant works from her home as a hairdresser and trader. The Tribunal

was told following: three of the visa applicant's children live with the visa applicant and her other two children live between her home and school. She supports them and the money the sponsor sends assists in their care. Benjamin has been working a trainee painter for the past year and the sponsor was unsure if he received payment. Charles and Richmond began a computer IT course two years ago and have finished the course, however continue to attend the school. Diana and Bright both attend school. At the first Tribunal hearing, Benjamin stated that he didn't do anything academic from 2007 to 2014. The Tribunal does not accept that the parties have any joint responsibility for the care and support of children. The Tribunal accepts the following: the parties live in separate countries and have not established their household.

20. The social aspects of the parties' relationship, the sponsor told the Tribunal that the parties are religious and attend church. They go out occasionally to eat and attended a wedding ceremony and a baby ceremony. Otherwise they enjoy being together. At the time of application statutory declarations were provided. These do not have any identification about the authors of the statements. Other statements appear to the Tribunal to be written by the same hand. The Tribunal places no weight on the information provided in these statements. More recent statutory declarations were provided with the identification of the authors. These collectively provide information about the parties' wedding, which some of the authors attended. Other information relates to the development of the parties' relationship and of some of the authors visiting the visa applicant. All declarants believe the parties' marriage to be genuine. Photographic evidence depicts the parties together and with others on their wedding day and together and with others at different locations. The Tribunal accepts the following: the parties represent themselves to other people as being in a partner relationship and that they are recognised as partners. The parties plan and undertake some joint social activities together.
21. The nature of the parties' commitment to each other, the parties have known each other since 2010. The parties began their married relationship on 26 October 2014. They have lived as married partners for approximately two months in 2014 and two months in 2018. Over the time of their marriage the sponsor has supported the visa applicant and her children by providing them with financial assistance. The sponsor told the Tribunal about a forthcoming back surgery and an expected recuperation time of approximately four months. They are progressively building a house in Ghana and have socialised together. The visa applicant expressed her desire to care for the sponsor over this time. The parties gave consistent evidence about the sponsor renting a larger home for himself and he visa applicants and about the visa applicant working and of both of them wanting to purchase a home in the future. Collectively, this evidence led the Tribunal to accept that the parties provide companionship and emotional support to each other and that they see their relationship as long-term.
22. The Tribunal carefully considered a number of aspects of the visa applicant and sponsor's parties oral evidence which concerned the Tribunal because it was inconsistent, or caused the Tribunal to question (more broadly) the reliability of the parties' oral evidence.
23. Specifically, on one occasion the sponsor provided different information about a statutory declaration given as part of the visa application. This contrasted with the visa applicant's information which was succinct, spontaneous and therefore reliable. On another occasion the sponsor was asked why the visa applicant hadn't known about his previous relationship. He stated that it was due to the fact that he hadn't told her. This contrasted with the visa applicant's information that she did know about the sponsor's previous relationship because he had told her but she became overwhelmed at the time she gave the information. Other concerns by the Tribunal related to vague information provided by the visa applicant about the sponsor's employment. Although the Tribunal has concerns about these inconsistencies, it has weighted them against the other consistent evidence provided by the parties and the

information provided in the post hearing submission and has determined that the inconsistencies are not fatal to the application under review. In addition, documents were provided without identification of the authors and or the issuing entity. In a post hearing submissions the sponsor provided the relevant identification documents.

24. Overall, the Tribunal is satisfied that the visa applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others; that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis. The visa applicant therefore meets the requirements of s.5F of the Act. Given these findings, the Tribunal is satisfied that the parties are in a spousal relationship.
25. The Tribunal proceeded with this decision on the basis of the parties being in a married relationship. However the Tribunal is cognisant of the fact that, even if the Tribunal had considered the parties' relationship against the de facto requirements of s.5CB of the Act, it would have come to the same conclusion that the parties have a commitment to a shared life to the exclusion of all others and meet the requirement in s.5CB(2)(a) of the Act. It is also satisfied that the additional criteria for a de facto relationship are met. The parties were both at least 18 years of age at the time of the marriage. They began their partner relationship on 27 October 2014 and the visa application on 16 June 2015. As a result the Tribunal is not satisfied that the parties were in a de facto relationship for 12 months prior to the lodgement of the visa. However, the Tribunal is satisfied that compelling and compassionate circumstances exist for the granting of the visa because, despite them being separated, the parties have continued to support each other, since their partner relationship began in October 2014 and profess that they will continue to support each other including through the sponsor's back operation and recovery. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
26. Therefore the visa applicant meets cl.309.211(2) and cl.309.221 of Schedule 2 to the Regulations.
27. As the visa applicant satisfies the criteria for the grant of the visa, the Tribunal directs that the second, third and fourth named applicants be considered against the relevant criteria for the grant of the visas.
28. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 309 visas.

DECISION

29. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 30.
 - cl.309.211(2) of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations; and
 - the second, third and fourth named applicants be considered against the relevant criteria for the grant of the visas.
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Helena Claringbold
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).